02-254

No. ~~01-1325~~

Supreme Court, U.S.
FILED
SEP 16 2002
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In The

Supreme Court of the United States

TOMMY R. SCHROEDER,

Petitioner,

v.

HAMILTON SCHOOL DISTRICT, GARY AMOROSO, DEAN SCHULTZ, RICHARD LADD, KATHLEEN COOKE, KEITH HICKLIN, and PATTY POLCZYNSKI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether a Title VII analysis shall be used in §1983 cases where sexual orientation hostile work environment discrimination in employment is the basis for the claimed Equal Protection violation.

2. Whether the Respondents denied Schroeder the equal protection of the law by intentionally discriminating against him because he is gay.

PARTIES TO THE PROCEEDING

In addition to the current parties named in the caption, the following were previously parties in this action:

1. Kris Wetherall, employed by respondent Hamilton School District as a teacher at Lannon Elementary School.

2. Katherine Crowley, employed by the respondent Hamilton School District as an Assistant Principal Activities Coordinator at Templeton Middle School.

On September 25, 2000, pursuant to a stipulation between the parties, the District Court for the Eastern District of Wisconsin entered an order dismissing Kris Wetherall and Katherine Crowley.

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OPINIONS BELOW

The May 17, 2002 denial by the United States Court of Appeals for the Seventh Circuit of the petition for rehearing or rehearing en banc can be found in the appendix attached to Schroeder's petition for a writ of certiorari at App. 49a.

The March 11, 2002 three-judge panel opinion of the United States Court of Appeals for the Seventh Circuit is located at App. 1a-26a. The majority opinion affirmed the United States District Court for the Eastern District of Wisconsin's grant of summary judgment to the respondents.

The March 16, 2001 opinion of the United States District Court for the Eastern District of Wisconsin is located at App. 27a-48a. The District Court granted summary judgment to the respondents.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Wisconsin granted summary judgment in favor of respondents on March 16, 2001. The United States Court of Appeals for the Seventh Circuit affirmed the decision on March 11, 2002. A petition for rehearing by the panel or, alternatively, for rehearing en banc was denied by the United States Court of Appeals for the Seventh Circuit on May 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution declares that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively

> to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VII of the Civil Rights Act of 1964 as amended, November 21, 1991, 42 U.S.C. § 2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioner Tommy R. Schroeder filed this action pursuant to 42 U.S.C. §1983 claiming a violation of his right to equal protection under the Fourteenth Amendment of the United States Constitution. Schroeder was a teacher in the Hamilton School District, which is the principal respondent. Individual respondents are the School District administrator and various administrative staff including school principals and human resource directors. Schroeder's complaint is expansive but alleges only a claim for denial of equal protection under 42 U.S.C. §1983. The complaint makes no reference or claim for a violation of Title VII (42 U.S.C. §2000e, et seq.).

In substance, Schroeder claims that he was harassed by students during the course of his teaching duties first at a middle school and then at an elementary school in the Hamilton School District. The respondents (hereinafter the "District") moved for summary judgment seeking dismissal of Schroeder's complaint on the basis that no

reasonable jury could find that the District had intentionally discriminated against Schroeder because of his sexual orientation. Schroeder also moved for summary judgment arguing, in part, that Title VII analysis should apply to his equal protection claim under 42 U.S.C. §1983.

By decision and order dated March 16, 2001, the United States District Court for the Eastern District of Wisconsin granted the District's motion for summary judgment and denied Schroeder's motion. The District Court held that "based on the record as a whole, no rational trier of fact could find for the plaintiff." App. 46a. A judgment of dismissal was entered on March 19, 2001. Schroeder appealed.

On March 11, 2002 a three-judge panel opinion of the United States Court of Appeals for the Seventh Circuit affirmed the District Court's analysis and decision that based upon the record, no reasonable jury could find that the defendants intentionally denied Schroeder equal protection of the law because he is gay. Schroeder's petition for rehearing or rehearing en banc was denied on May 17, 2002.

A. RESPONSE TO SCHROEDER'S STATEMENT OF THE CASE

Respondents herein address those portions of Schroeder's statement of the case which they perceive contains misstatements or requires clarification. The "facts" set forth in the petition have already been discussed by the

District Court, the Seventh Circuit (App. 2a-6a)[1], as well as in respondents' prior briefs. Schroeder continually refers to his own testimony or self-serving documents which he created to support his position. For example, his frequent reference to Exhibit 3 is a summary which he prepared and gave to his attorneys. (R. 98A, pp. 27-30).

Although Schroeder states he received a death threat in 1989, he fails to include that he testified at deposition in this matter that the alleged threat was made by an eighth grader, apparently heard by no one, and that Schroeder did not reprimand the student or report it to the school administration or even to fellow teachers. (R 98A, p. 143). The alleged death threat in 1996 was not heard by Schroeder but only, according to his own testimony, reported to him by a fellow teacher, Maxine Kaye. (R. 98A, p. 144). The District Court correctly noted that Schroeder cannot rely upon hearsay to oppose a motion for summary judgment. (App. 44a-45a). Nonetheless, Maxine Kaye testified at deposition that it "did not happen".

With regard to the 1993 graffiti incident in the boy's bathroom, support is found only in Schroeder's summary. He never reported it to anyone at the time it allegedly occurred or thereafter. Likewise, if he ever found other graffiti, by his own admission he never reported it to the District administration. (R. 98A, p. 159). The 1994 bathroom graffiti incident has been discussed at some length by the District Court and the Seventh Circuit. It is uncontroverted

[1] All references in this petition to "App." followed by a number or numbers are intended to refer to a page or pages in the appendix to Schroeder's petition for a writ of certiorari.

that the two students involved were caught and disciplined. (R. 98A, pp. 67-71).

Occasionally Schroeder did receive taunts from students or from others anonymously at home over the phone. However, whenever he reported the incidents and the taunters could be identified, they were disciplined. Further, Schroeder admits he often assumed, but did not know, that the anonymous callers were parents of Hamilton students. (R. 98A, p. 153, relating his "gut feeling"). On one occasion, he first told Assistant Principal Patty Polczynski that he received a harassing phone call at home from a student but later changed his mind and said the caller actually sounded older and could not be identified.

Schroeder has also admitted in his deposition testimony that he refused to disclose names of staff members who he claimed had harassed him on occasion. (R. 98A, p. 158). Likewise, Schroeder admitted in his deposition that he did not report to the District administration all comments by parents either overheard or related to him by others. (R. 98A, p. 145).

Principal Hicklin confirmed that Schroeder refused to tell him the names of staff that were allegedly harassing Schroeder in April of Hicklin's last year as principal. (AE App., p. 29)[2]. When Schroeder reported to him that he had received harassing telephone calls at his home, Hicklin asked to hear a recording of the calls. (AE App., pp. 29-31).

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[2] All references in this petition to "AE" followed by a number or numbers are intended to refer to a page or pages in the Respondents' Seventh Circuit Appendix.

Hicklin then tape recorded them, and played the tape for the police liaison officer at the school. (AE App., p. 30). The liaison officer told Hicklin that there was nothing he could do because the tape was undistinguishable and there was no type of identifying characteristic. *Id.*

When Schroeder complained to Hicklin that a child was calling him names from the bus, Hicklin boarded the bus, and identified the culprit as a high school student. Hicklin then promptly reported the incident to the high school for discipline. (R. 98A, p. 317). The same was true when name calling from buses was reported to then Associate Principal Patty Polczynski. When students could be identified, they were disciplined. (R. 98A, p. 251). When high school students were involved, the high school administration was contacted to discipline their students. (R. 98A, pp. 250-251). For example, after Schroeder complained to Polczynski in March 1996 about high school students calling him names from the bus, Polczynski called the high school twice and contacted the bus company to speak with the bus driver. (R. 98A, p. 59). On another occasion, Polczynski boarded the bus and followed through with a call to the high school regarding one of the students. (R. 98A, p. 59). There were about 60 kids on each bus, about 40-45 of whom attended Templeton Middle School. In most instances, Schroeder did not know who had made the comments. However, Polczynski also had Schroeder look at a yearbook in an effort to identify the students who were responsible. (R. 98A, p. 251).

Regarding his transfer from Templeton Middle School to the elementary school, Schroeder first requested a transfer in June 1994. However, the bargaining agreement between Schroeder's union and the District required all transfers to be submitted no later than April 15, 1994. (R.

98A, p. 160). The 1994 transfer request by Schroeder simply indicated he wanted to work with younger children. He did not base his request for transfer on any claim that he was being harassed in any respect. (R. 98A, p. 161). There was no transfer request for the following school year, 1995. However, it is undisputed that Schroeder submitted a timely transfer request for the 1996-1997 school year, which was granted by the District.

Although Schroeder acknowledges that he had numerous meetings with various administrators in regard to his complaints, nonetheless, he claims that in one such meeting Patty Polczynski made the comment that "boys will be boys." It is perhaps curious that Schroeder himself does not include those words in his self-serving summary (R. 98A, pp. 27-30, Exh. 3), and it is perhaps even more curious that the quoted words are taken in full from *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996), which Schroeder had a copy of. Further, Schroeder's citation to the record in regard to these comments is more than confusing. In respect to the above claimed statement by Polczynski, Schroeder cites to Exhibit 39 (R. 98A, p. 35) which is a letter Schroeder wrote to Polczynski. The letter never mentions the comment and in fact concludes with Schroeder stating to Polczynski, "Thanks for your past support and I hope I can depend on that in the future." Schroeder's own letter is further evidence and an admission that rather than being deliberately indifferent to Schroeder's complaints, the administration was supportive and concerned. Furthermore, Schroeder's reference to the record at 98C, p. 279, is to Patty Polczynski's deposition transcript which recounts a meeting with Schroeder where she said, "My personal professional goal is to increase appreciation for diversity. I shared that with Mr. Schroeder."

Ms. Polczynski's goal is completely opposite to any notion of deliberate indifference.

Furthermore, the record thoroughly reviewed by the District Court and affirmed by the Seventh Circuit, contains evidence of the District's direct and expeditious response to taunts by students. For example, Polczynski on more than one occasion met with Schroeder to discipline a particular student and to keep Schroeder informed of the discipline. (See, for example, R. 98C, pp. 261-267). (We also note parenthetically that Schroeder's claim in his petition (p. 3) that an administrator "angrily shouted" at him is not found in the record as cited by him as support for this statement.)

The memorandum of August 1997 to which Schroeder refers to was anonymous and not circulated. Only one parent was known to have received the anonymous memorandum and that parent passed it on to Schroeder who provided it to the administration. (R. 98A, p. 163). The District investigated who wrote the memorandum but the author could never be determined. (Earlier in this lawsuit Schroeder sued a fellow teacher, Kristine Wetherall, alleging that she wrote the memo based upon his "gut feeling" (AE App., p. 22); he later voluntarily dismissed that claim on its merits. (AE App., pp. 95-96)).

The first person Schroeder talked to about the memorandum was Karen Thompson, a fellow teacher with whom Schroeder would be teaching a "blended classroom" of first and second graders in 1998. (AE App., p. 21). The principal at Lannon Elementary School, Mr. Ladd, did not recall receiving a copy of the document, but heard about it during a meeting with Superintendent Dr. Cooke. (AE App., pp. 89-90). Ladd, Cooke, Schroeder, and Thompson

met to discuss the course of action to take and to discuss the upcoming parent meeting for parents of the students who would be in the blended classroom. (AE App., p. 90).

Plans were formed for the upcoming parent meeting regarding the blended classroom. The District developed a specific agenda for the parent meeting so that it would remain controlled; a strategy was developed in case any specific questions were raised about Schroeder; a strategy was also planned to alert the sheriff's department and to have them in the area during the meeting if some trouble should develop; a further strategy was planned regarding which district staff would attend the meeting. (AE App., pp. 65-67). Dr. Cooke arranged to be in her office so as to be available at a moment's notice, and two district staff members attending the meeting would have cell phones to use, if necessary, during the meeting. *Id.* It would have been highly unusual for Dr. Cooke, as the Superintendent, to have attended such a meeting. (AE App., p. 66).

Statements were also planned, if the letter had become public (it was not determined that anyone other than Schroeder's friends had received the letter) that would be supportive of Schroeder. (AE App., pp. 66-67). There was never an intent to discuss Schroeder's sexual orientation at the meeting because it would not have been appropriate, since the focus of the meeting was on the blended classroom and not on Schroeder. (AE App., p. 68). The meeting took place without incident of any type.

The District investigated who might have written the letter about Schroeder and the blended classroom, but no one, including Schroeder, was ever able to identify who wrote it. (AE App., pp. 69-70). Despite these efforts, and considering that the administration did not want to spread

news of the letter since only very few people had received it or were even aware of it, the person who wrote the letter remains unknown.

The District administration took what can only be described as extraordinary measures to protect Schroeder, both personally and physically, from any "fallout" from the letter, and to ensure his safety at the meeting. The apathy and deliberate indifference that Schroeder portrays in his complaint and argues to this Court relative to this incident and others, is simply inaccurate and totally misleading. The District Court agreed concluding that although Schroeder may disagree with the level of response, nonetheless, no reasonable trier of fact could find for Schroeder. (App. 22a-24a). The record in this matter is simply devoid of any evidence of intentional discrimination against Schroeder on the part of the District or any of the individual defendants. Schroeder was not treated with any level of indifference, deliberate or otherwise. When Schroeder reported incidents, including telephone calls that he received at his home rather than at school, they were investigated. When students were identified, including the students who wrote graffiti on the bathroom walls, they were consequenced.

SUMMARY OF REASONS FOR DENYING THE WRIT

1) This is not a Title VII case. Sexual orientation is not a proscribed classification under Title VII. From time to time, the United States Congress has been asked to add sexual orientation to Title VII, but has refused to do so.

2) Title VII analysis does not apply to 42 U.S.C. §1983 sexual orientation claims. Neither the United States Congress, this Court, nor any federal circuit court of appeals has applied Title VII analysis to a claim for sexual orientation in the context of an equal protection lawsuit.

3) The United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit's analysis of the facts and equal protection law is correct. No reasonable jury could conclude that the respondents intentionally discriminated or acted with deliberate indifference toward Schroeder's situation because of his sexual orientation. At most, Schroeder makes a claim that the District administrators were negligent in the manner in which they responded to his complaints. Simple negligence cannot support a claim for denial of equal protection.

REASONS FOR DENYING THE WRIT

I. THE DECISION DENYING APPLICATION OF TITLE VII TO A SEXUAL ORIENTATION EQUAL PROTECTION CASE IS CORRECT.

A. This Is Not A Title VII Case.

Schroeder asks this Court to set aside precedent as well as congressional legislative prerogative and hold that Title VII analysis should apply to an equal protection claim based on sexual orientation as a suspect class. In short, Schroeder asks this Court to do what the United States Congress has refused to do and include sexual orientation as a proscribed category in employment discrimination claims. The Seventh Circuit cited *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 140

L. Ed. 2d 210, 118 S. Ct. 1003 (1998) for the mandate of separation of powers and stated:

> As such, to the extent Schroeder seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so. It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit. App. 6a.

A detailed reading of Schroeder's expansive complaint, quickly reveals that a claim under Title VII is not pled in any respect. Rather, Schroeder exclusively bases his complaint upon the Equal Protection Clause of the Fourteenth Amendment made enforceable through 42 U.S.C. §1983. Indeed, throughout the petition, Schroeder correctly refers to his action as one for equal protection based on a hostile work environment because of his sexual orientation. (Petition p. 3). Despite the fact that the words "Title VII" appear no where in his complaint and pleadings, Schroeder continues to argue that the Seventh Circuit should have used a Title VII analysis in his case.

Federal anti-discrimination laws prohibit employment discrimination on the bases of race, religion, national origin, and sex (Title VII, 42 U.S.C. §2000e, et seq.), age (Age Discrimination in Employment Act, 29 U.S.C. §623(a)), and disability (Americans with Disabilities Act, 42 U.S.C. §12112), but not sexual orientation. Title VII does not explicitly define the term "sex". However, the courts have consistently read sex to mean gender, and rejected all attempts to extend Title VII's protection to sexual orientation. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), cert. denied April 23, 2001; *Higgins v. New Balance*

Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999). Title VII does not proscribe harassment simply because of sexual orientation. *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989).

There have been several proposals in the United States Congress to amend Title VII to include sexual orientation in the list of protected categories, but they have all failed. (See, for example, H.R. 2074, 96th Congress (1979); and H.R. 8269, 95th Congress (1977)). More recent legislative action in this area has focused on passage of the so-called Employment Non-Discrimination Act or ENDA. The ENDA seeks to extend federal anti-discrimination protection to gays and lesbians under a framework similar to that used in Title VII. ENDA was first introduced in the United States House of Representatives in 1994. (H.R. 4636, 103rd Congress (1994)). It apparently has been reintroduced at each subsequent Congressional session. To date, Congress has refused to pass it.

The respondents respectfully submit that the courts should not do what the United States Congress has refused to do, which is to include sexual orientation in a Title VII framework and analysis.

B. The Federal Courts Have Not Applied A Title VII Analysis In An Equal Protection Lawsuit Alleging Sexual Orientation.

In his petition to this Court, Schroeder asks the Court to apply Title VII employment discrimination standards to a §1983 equal protection case based on sexual orientation. The Seventh Circuit correctly rejected Schroeder's attempt

to apply Title VII analysis in a traditional equal protection analysis. App. P. 6a. In his petition, Schroeder continues to argue the incorrect inference that there is precedent for applying Title VII analysis in a §1983 employment discrimination case based on sexual orientation. Cases from other circuits upon which he relies do not support that inference.

Intent to discriminate is always an element to be proved under equal protection discrimination analysis. *Washington v. Davis,* 426 U.S. 229 (1976); *Massachusetts v. Feeney,* 442 U.S. 256 (1979). However, Schroeder is wrong when he says in his petition that intent to discriminate is always an element under Title VII. (Petition, p. 7).

Perhaps Schroeder is half right. Certainly, all claims for equal protection require intentional conduct by the defendant. Likewise, claims under Title VII for disparate treatment discrimination also require intentional conduct. That is, in a disparate treatment case, a plaintiff must prove discriminatory animus. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089 (1981); *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). However, the same is not true of all Title VII cases. Schroeder oversimplifies Title VII law by applying the intentional act standard for quid pro quo sexual harassment to claims for hostile work environment discrimination. That is, it is undeniably the case that where a supervisor engages in quid pro quo sexual harassment, his or her actions must be intentional; that is, the very nature of a quid pro quo case by definition indicates that the intent of the plaintiff's supervisor to demand certain favors of her because of her sex requires that the supervisor's action evidence that intent. But Schroeder does not claim quid pro quo

sexual harassment or even quid pro quo sexual orientation harassment. He does not claim that his supervisors were the harassers. Rather, he claims that he was being harassed by mostly children, i.e., students, and perhaps by some unidentified staff members or parents. Therefore, he pleads a case for hostile work environment due to his sexual orientation.

Although the respondents have not contested as a matter of law that Schroeder may make such a claim under the equal protection clause of the 14th Amendment and §1983 (see *Nabozny*, supra, and *Romer*, infra), nonetheless, the equal protection claim brings with it the intentional standard of proof. ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identified group." *Massachusetts v. Feeney*, at p. 279).

Certainly, Title VII jurisprudence recognizes a hostile work environment claim for sexual harassment. *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986); *Harris v. Forklift Systems*, 114 S.Ct. 367 (1993). Of course, one element of such claim is that plaintiff be a member of a protected class, that is, based on sex. It is clear that Title VII recognizes no claim for hostile work environment based on sexual orientation.

However, in the sexual harassment hostile work environment context, the negligence of the employer is the most common theory of recovery. See Lindemann & Grossman, *Employment Discrimination Law*, 3rd Ed., Vol. I at p. 814. Indeed, Judge D. Wood in her dissent in this

case recognized as much where she cited three recent 7th Circuit cases "all recognizing that an employer is only liable under Title VII for co-worker harassment if it is negligent . . . " App. P. 22a. Therefore, if the court were to apply Title VII hostile work environment analysis to this equal protection case, it would be eviscerating the long-standing standard of intentional action proof required to support a violation of the equal protection clause of the 14th Amendment.

As noted, this difference in proof in employer negligence standard and hostile work environment cases was correctly recognized by the majority of the 7th Circuit as well as by Judge D. Wood in her dissent. It is also very telling that not even Judge Wood in her dissent accepts Schroeder's invitation to graft a Title VII analysis onto this equal protection case.

The cases relied upon by Schroeder in his petition could have been brought solely as a Title VII case. That is, the Title VII claim could have stood independent of the equal protection claim brought under §1983. That is not the situation in the case now before the Court. Moreover, the cases relied upon by Schroeder were disparate treatment cases where the intentional standard of proof is applied. In *Wallace v. Texas Tech University*, 80 F.3d 1042 (5th Cir. 1996), an African-American basketball coach failed to establish race discrimination played a role in the refusal to renew his contract, disparate treatment in failing to renew contract; *Harris v. Shelby County Board of Education*, 99 F.3d 1078 (11th Cir. 1996), disparate treatment in failing to promote plaintiff to school principal because of his race; *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986), disparate treatment in promotion, transfer, discharge, and terms and conditions of employment

based on race and sex; *Briggs v. Anderson,* 796 F.2d 1009 (8th Cir. 1986), disparate treatment claim under Title VII for intention to deny a promotion based on sex and race. Finally, *Weberg v. Franks*, 229 F.2d 514 (6th Cir. 2000), is perhaps most illustrative of this point. There, plaintiff claimed reverse race discrimination under §1983 and the court did note that under such an equal protection claim, the plaintiff must show that the employer made its adverse employment decision with a discriminatory intent. The Sixth Circuit went on to note in that part of its decision under the heading "Disparate Treatment" that courts will look to Title VII disparate treatment cases for assistance in analyzing race discrimination in public employment context under §1983. *Id.*, p. 522. That is so because as we have already seen disparate treatment and §1983 have the intention to discriminate requirement. However, later in the opinion under the heading "Disparate Impact", the Sixth Circuit dismissed the disparate impact claim in two sentences holding that "mere disparate impact is not sufficient to state an equal protection claim under §1983." *Id.*, p. 528. This is so because a disparate impact claim is more akin to a negligent standard of proof. Therefore, the cases relied upon by Schroeder are easily distinguishable from this matter and in fact support the proposition where the discriminatory employment claim is for disparate impact or hostile work environment, the Title VII proof or analysis does not lend itself to an equal protection claim under §1983.

In this case, the underlying facts clearly do not support both a Title VII and a constitutional deprivation claim. Schroeder's claim for sexual orientation discrimination must fail under Title VII. Therefore, since his only claim is a constitutional deprivation claim for denial of

equal protection, he should not be allowed to avail himself of the Title VII analysis in the §1983 context.

In addition, unlike Title VII, §1983 permits suit against individual state actors in their official and/or individual capacities. Indeed, Schroeder sued individuals in this case in addition to his former employer, the Hamilton School District. Title VII does not permit suit against individuals, even if those individuals acted as Schroeder's supervisors or managers. Only the employer may be sued in a Title VII case. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *United States EEOC v. AIC Security Investigations Limited*, 55 F.3d 1276 (7th Cir. 1995). Therefore, to apply Title VII analysis to the respondents in this case would not only expand Title VII to a class of employee-plaintiffs not intended by Congress, but would also apply Title VII analysis to defendant-individuals whom Congress and the courts have set outside the scope of Title VII.

II. THE SEVENTH CIRCUIT'S DECISION IS IN HARMONY WITH THE FEDERAL CIRCUITS AND THIS COURT'S DECISIONS REGARDING EQUAL PROTECTION.

A. The Seventh Circuit Decision Is Consistent With Established Equal Protection Law.

In order to reach trial on an equal protection claim, the petitioner must provide evidence showing that the defendants (1) treated him differently from others who were similarly situated; and (2) intentionally treated him differently because of his membership in the class to which he belonged; and (3) because homosexuals do not enjoy any heightened protection under the Constitution, that the

discriminatory intent was not rationally related to a legitimate state interest. App. 6a-7a, citing *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996); *Hedrich v. Bd. Of Regents*, 274 F.3d 1174, 1183 (7th Cir. 1996).

These requirements are stated in the conjunctive. All three must be satisfied by Schroeder. ("The District Court's decision to grant the defendants' motion for summary judgment of this claim must be sustained if the defendants demonstrate that they did not deny Schroeder equal protection on account of his sexual orientation, *or* that they had a 'rational basis' for doing so." App. 7a (emphasis added)). Although Schroeder's claim fails on all three points (as noted by Judge Posner in his concurrence), nonetheless, it is sufficient to affirm the District Court to find that this record does not support a claim of intentional discrimination against Schroeder because he is gay. At most, Schroeder's claim has the shadow of a negligence action, i.e., he and perhaps others might disagree on the manner and magnitude that students were consequenced. Nonetheless, to say that others might have done things differently is to fall woefully short of making out a case of intentional discrimination.

Relying on *Nabozny* and other cases, the Seventh Circuit correctly identified the question in this case as not whether the respondents sufficiently promoted a positive attitude toward homosexuality in the school environment, but rather whether the manner in which they handled petitioner's complaints of harassment denied him equal protection of the law. The District Court and the Seventh Circuit opinions found that there is no evidence upon which a reasonable jury could find that the respondents were deliberately indifferent to Schroeder's situation. App., p. 46a; App. 14a-15a. To the contrary, the District

Court and the Seventh Circuit note that upon this record, the school district has shown that it was genuinely concerned about Schroeder's treatment and acted appropriately under the circumstances. App. 14a.

In coming to this conclusion, the District Court and the Seventh Circuit noted that the record here is replete with memoranda, correspondence and testimony about how the respondents responded to Schroeder's requests and complaints. Therefore, the District Court and the Seventh Circuit were correct in finding that no reasonable jury could find that Schroeder would be able to satisfy the elements of an equal protection claim.

B. The Seventh Circuit Opinion Is Not In Conflict With *Romer v. Evans*.

Nowhere in its opinion does the Seventh Circuit "rank" groups in order of priority. The Seventh Circuit opinion does not in any way suggest that African-Americans or any other race are entitled to more equal protection than a woman. However, this Court and every federal circuit Court of Appeals, have recognized that some groups have been given the label "suspect class" and are entitled to a higher level of scrutiny when their status is a factor under an equal protection analysis.

This Court has not included sexual orientation in the list of suspect classes. To the contrary, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court operated on the understanding that sexual orientation is not a suspect class. (See, *Romer*, *Scalia* dissent, footnote 1.) Several federal circuit Courts of Appeals have also ruled that rational basis review is appropriate where sexual orientation is involved. *Jantz v. Muchi*, 976 F.2d 623, 630 (10th Cir.

1992), cert. denied, 508 U.S. 952 (1993); *High Tech Gaze v. Defense Industry Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); and *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

A fair reading of the majority opinion does not indicate a ranking among suspect classes or even between suspect classes and non-suspect classes. Rather, the Seventh Circuit simply recognizes the commonsense reality that it is not irrational to prioritize activities, even when those activities involve responding to complaints, concerns or problems of certain identifiable groups. As Judge Posner noted, this is not to say that homosexuals are "constitutional outlaws." Concurring opinion, App. 17a. Indeed, the District's response to Schroeder's treatment was not motivated by hostility to homosexuals. Schroeder presents no evidence from which a reasonable jury could infer intentional discrimination, that is, that these respondents were purposely hostile to him because he is homosexual. In an attempt to refute that conclusion by the District Court, the Seventh Circuit noted that Schroeder set up "a false dichotomy – i.e., disparity of treatment/protection given to blacks/women as compared with homosexuals. In reality, these examples merely demonstrate the school district's priorities for use of time and resources in favor of its students." App. 8a-9a.

The magnitude of the response in absolute terms is not a measure of deliberate indifference. The Seventh Circuit does no more than recognize this principle and, as applied to Schroeder's situation, finds that the District dealt with it appropriately given the source of the harassment

(often anonymous), what was known or not known of the harassers, and the prevalence or total lack thereof of other similarly situated teachers. At no time does the Seventh Circuit hold that Schroeder's situation fell outside the protections which the Constitution afforded him. Rather, the Seventh Circuit recognizes that those protections were appropriate to the situation facing the school district and Schroeder in this case. The District's response was rational. *Irizarry v. Chicago Bd. Of Ed.*, 251 F.3d 604, 610 (7th Cir. 2001), citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) and other cases.

The petitioner totally misses the point when he argues that the District "allow[ed] Schroeder to be harassed and abused because they could not afford to protect him." (Petition, p. 12). This assertion stumbles on its own premise. The District Court and the Seventh Circuit found no evidence that the District *allowed* Schroeder to be harassed and abused. To the contrary, "[t]he record is replete with memos, correspondence, and testimony indicating that various administrators and staff positively responded to his requests." App. 14a-15a. Here, these respondents did not use limited resources to intentionally discriminate against Schroeder because he is gay. Rather, as the District Court and the Seventh Circuit held, the District did not treat him differently in the first place. ("There is no evidence that the defendants were deliberately indifferent to his situation, or that they did not make a sincere effort to deal with his complaints." App. 14a-15a).

Saenz v. Roe, 526 U.S. 489 (1999), has no application here. That case was decided on the Citizenship Clause of the 14th Amendment holding that the clause does not tolerate subclasses of similarly situated citizens based on location of their prior residence. It has nothing to do with

hostile work environment employment discrimination or the equal protection clause. It is fairly limited to its facts and certainly does not hold that a municipality can never use saving money as a rational justification for its action. Moreover, the result in Schroeder's case would be the same since the District never allowed Schroeder to be harassed in the first instance.

In *Wayte v. United States*, 470 U.S. 598 (1985), this Court elaborated on the confines of the selective enforcement defense. In *Wayte*, the defendant was indicted for failure to register with the selective service system. He moved to dismiss the indictment, claiming that the selective service's policy of investigating and referring for prosecution only those who were "vocal" opponents of the registration program violated the guarantee of equal protection. *Id.* at 604. This Court found it "appropriate to judge selective prosecution claims according to ordinary equal protection standards", *id.* at 608, and reiterated the proposition that the defendant must demonstrate that the government official was motivated by an intent to discriminate based upon an illegitimate group characteristic. *Id.* at 608-609.

Likewise, in order to prevail here, Schroeder must demonstrate that the District was motivated by an intent to discriminate against him based upon his homosexuality. As previously noted, he totally fails in that proof. The District's response was rational.

III. NO REASONABLE JURY COULD FIND IN FAVOR OF SCHROEDER.

As already pointed out, the District Court and the Seventh Circuit meticulously reviewed the record in this

case; and each concluded on this record that Schroeder failed to present evidence from which a reasonable jury could find intentional or purposeful discrimination because Schroeder is gay and summary judgment was granted for respondents.

> The gravaman of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. The plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. *Nabozny* at pp. 453-54 (citation omitted).

Clearly, in this matter, Schroeder has failed to produce any evidence of intentional discrimination on the part of the District or on the part of any of the individual respondents. Moreover, the testimony of all witnesses reveals that the complaints of Schroeder were not treated with any level of indifference, deliberate or otherwise. When Schroeder reported incidents, including telephone calls that he received at his home rather than at the school, they were investigated. When students were identified, including the students who wrote graffiti on the bathroom walls, they were reprimanded and disciplined. There is no evidence that demonstrates an intentional or purposeful discrimination to show an equal protection violation.

CONCLUSION

Accordingly, Respondents respectfully request that Schroeder's petition for writ of certiorari be denied.

Respectfully submitted,

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